Supreme Court, U.S.
FILED

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In the

Supreme Court of the United States

October Term, 1998

CYNTHIA SHANNON,

Petitioner,

v

CONSOLIDATED FREIGHTWAYS CORPORATION; UNITED STATES DEPARTMENT OF LABOR, ADMINISTRATIVE REVIEW BOARD,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

PHILLIP L. HARMON, ESQUIRE
Counsel of Record
6649 North High Street
Suite 105
Worthington, Ohio 43085
(614) 433-9502

Curry & Taylor Appellate Service (202) 393-4141/rcurry8020@aol.com

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals erred by finding substantial evidence in support of its ruling that Petitioner Shannon was lawfully discharged?

II. Whether the "dual motive analysis" used in deciding employment discharge cases nationwide should be clarified by the Supreme Court?

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The Decision of the Administrative Review Board of the United States Department of Labor is set forth in the Appendix, p. 5a and is unpublished. The Decision of the Sixth Circuit Court of Appeals affirming the Decision of the Administrative Review Board is set forth in the Appendix, p. 1a and is unpublished. An Order by the Sixth Circuit Court of Appeals denying the timely filing of a Petition for Rehearing is set forth in the Appendix, p. 21a.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The Supreme Court has jurisdiction to consider the instant Petition for Writ of Certiorari pursuant to 28 U.S.C. §1254(1). The United States Court of Appeals for the Sixth Circuit issued its denial for Ms. Shannon's Petition for Rehearing on June 2, 1999. The instant Petition for Writ of Certiorari was timely filed within ninety days of the denial of the Petition for Rehearing and is thus timely.

Pursuant to Supreme Court Rule 29.4(a), Petitioner hereby states and declares that three copies of the Petition for Writ of Certiorari have been or will be served upon the parties named in the caption hereof and upon the Solicitor General of the United States, Room 5614, Department of Justice, 10th Street and Constitution Avenue, N.W., Washington, DC 20530 in the manner prescribed by law.

CONSTITUTIONAL, STATUTORY, AND ORDINANCE PROVISIONS INVOLVED IN THIS CASE

49 U.S.C. § 31105 (1994). Surface Transportation Assistance Act,

Section 31105. Employee protections

(a) Prohibitions.

(1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because--

(A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or

(B) the employee refuses to operate a vehicle because--

(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

(2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious

impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

(b) Filing complaints and procedures.

(1) An employee alleging discharge, discipline, or discrimination in violation of subsection (a) of this section, or another person at the employee's request, may file a complaint with the Secretary of Labor not later than 180 days after the alleged violation occurred. On receiving the complaint, the Secretary shall notify the person alleged to have committed the violation of the filing of the complaint.

(2) (A) Not later than 60 days after receiving a complaint, the Secretary shall conduct an investigation, decide whether it is reasonable to believe the complaint has merit, and notify the complainant and the person alleged to have committed the violation of the findings. If the Secretary decides it is reasonable to believe a violation occurred, the Secretary shall include with the decision findings and a preliminary order for the relief provided under paragraph (3) of this subsection.

(B) Not later than 30 days after the notice under subparagraph (A) of this paragraph, the complainant and the person alleged to have committed the violation may file objections to the findings or preliminary order, or both, and request a hearing on the record. The filing of objections does not stay a reinstatement ordered in the preliminary order. If a hearing is not requested within the 30 days, the preliminary order is final and not subject to judicial review.

(C) A hearing shall be conducted expeditiously. Not later than 120 days after the end of the hearing, the Secretary shall issue a final order. Before the final order is issued, the proceeding may be ended by a settlement agreement made by the Secretary, the complainant, and the person alleged to have committed the violation.

(3) (A) If the Secretary decides, on the basis of a complaint, a person violated subsection (a) of this section, the Secretary shall order the person to--

(i) take affirmative action to abate the violation; (ii) reinstate the complainant to the former position with the same pay and terms and privileges of employment; and (iii) pay compensatory damages, including back pay.

(B) If the Secretary issues an order under subparagraph (A) of this paragraph and the complainant requests, the Secretary may assess against the person against whom the order is issued the costs (including attorney's fees) reasonably incurred by the complainant in bringing the complaint. The Secretary shall determine the costs that reasonably were incurred.

(c) Judicial review and venue. A person adversely affected by an order issued after a hearing under subsection (b) of this section may file a petition for review, not later than 60 days after the order is issued, in the court of appeals of the United States for the circuit in which the violation occurred or the person resided on the date of the violation. The review shall be heard and decided expeditiously. An order of the Secretary subject to review under this subsection is not subject to judicial review in a criminal or other civil proceeding.

(d) Civil actions to enforce. If a person fails to comply with an order issued under subsection (b) of this section, the Secretary shall bring a civil action to enforce the order in the district court of the United States for the judicial district in which the violation occurred.

STATEMENT OF THE CASE

Petitioner Shannon filed a complaint against Consolidated Freightways Corporation ("CF") with the Occupational Safety and Health Administration ("OSHA") on December 21, 1994. Ms. Shannon alleged that her discharge from employment was unlawful under Section 405(a) and 405(b) of the Surface Transportation Assistance Act of 1982 ("STAA") because it was actually executed in retaliation for her action of reporting a federal motor carrier safety violation by CF, 49 U.S.C. §31105(a)(1)(A), and in retaliation for her refusal to violate a motor vehicle safety regulation, 49 U.S.C. §31105 (a)(1)(B)(i).

On January 26, 1994, the Acting Regional Director of the U.S. Dept. of Labor-OSHA issued Secretary's Findings ("Secretary's Findings"). The Acting Regional Administrator ruled that, "the preponderance of the evidence indicated that the complainant's termination was not related to her protected activity. Under these circumstances, respondent did not violate Section 31105 of the STAA and the complaint is dismissed".

Ms. Shannon appealed the Secretary's Findings issued by the Acting Regional Director. An Administrative Law Judge ("ALJ") conducted a Hearing *de novo* on Ms. Shannon's appeal on October 15-16, 1996. The ALJ issued a

Recommended Decision and Order on December 16, 1997. The ALJ concluded that that the adverse action taken by the Employer was motivated by an altercation between Ms. Shannon and another employee (the "Dowler incident"). The ALJ found no evidence to indicate that the adverse action was in any way motivated by Ms. Shannon's protected activity.

Ms. Shannon appealed the ALJ's Recommended Order to the United States Department of Labor, Administrative Review Board ("ARB"). Ms. Shannon argued there was substantial evidence of federally protected activity and that such protected activity had been presented by CF as the primary motivating factor for her discharge at her internal disciplinary hearing on August 30, 1994 and at the OJSC Hearing.

On April 15, 1998, the ARB issued a Final Decision and Order. The ARB reversed the ALJ on the issue of protected activity but upheld the Recommended Order. The ARB found, as follows:

> "We find that Shannon at minimum engaged in protected activity under the STAA section 31105(a)(1)(A) (protected safety complaint) when she disagreed with, and expressed concerns to, the CF dispatchers about logging improprieties and continuing to drive when her permissible hours were exhausted"... "We adopt the ALJ's recommendation, nonetheless, because CF demonstrated that it would have discharged Shannon absent any protected activity. Substantial evidence supports this ALJ finding, rendering it conclusive. 29 C.F.R. §1978.109(c)(3). The ALJ credited Koble's testimony that he decided to discharge

> Shannon upon learning of the July 20 confrontation and immediately initiated discharge proceedings...".

Appendix, p. 14a.

On June 12, 1998, Ms. Shannon timely filed her Petition for Review with the United States Court of Appeals for the Sixth Circuit.

On May 14, 1999, the Court of Appeals issued its Decision which upheld the ARB's Decision. On May 24, 1999, Petitioner Shannon timely filed her Petition for Rehearing. On June 2, 1999, the Court of Appeals denied the Petition for Rehearing. On June 11, 1999, the Court of Appeals issued its Mandate.

The ARB properly exercised jurisdiction below pursuant to 49 U.S.C. § 31105(b). The Sixth Circuit Court of Appeals properly exercised jurisdiction on appeal pursuant to 49 U.S.C. § 31105(c).

ARGUMENT

I. Although the Employer may have initially been motivated to discharge the employee for legitimate reasons, it actually carried out the discharge for illegal discriminatory reasons:

A. Standard of Review:

In reviewing a Decision under the STAA by the Administrative Review Board, the Court of Appeals applies a

"substantial evidence" standard. *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987). A reviewing court must uphold the Board's legal conclusions "unless they are arbitrary, capricious, involve an abuse of discretion, or otherwise are not in accordance with law." *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992). The Court will accord deference to the Secretary's interpretations of the STAA, and will uphold such interpretations if "reasonable, consistent with the statutory mandate, and persuasive." *Yellow Freight System, Inc. v. Robert B. Reich, Secretary of Labor; and Willie W. Smith*, 27 F.3d 1133, 1136 (6th Cir. 1996). Nonetheless, the Court does not function as a "mere rubber stamp" for the factual and credibility determinations made below, *see, e.g., NLRB v. Cook Family Foods, Ltd.*, 47 F.3d 809, 816 (6th Cir. 1995), and must evaluate the entire record and acknowledge any evidence which undermines the particular decision of the Board. *W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 870 (6th Cir. 1995).

B. Where the reasons for discharge change from legitimate to illegal before it is carried out, the Employer should not be immune in a civil action for reinstatement and damages

On August 25, 1994, Cynthia Shannon, an over-the-road truckdriver for CF began the return leg of a round-trip from Columbus, Ohio to Peru, Illinois, and back to Columbus. Under applicable U.S. Department of Transportation regulations, she did not have sufficient hours of "on-duty or driving" time to make her return trip to Columbus via Sidney, Ohio. Ms. Shannon and her union steward each notified CF that she was short of hours well before the time she reached Sidney.

While en route waiting for a load change at the Sidney, Ohio terminal, the CF dispatcher instructed Ms. Shannon to mark her logs as "off duty", a clear violation of DOT regulations. At the ALJ Hearing, CF admitted that relieving a driver of duty while en route, an illegal act designed to avoid important national safety regulations, is a normal practice by CF and by the trucking industry as a whole.

Ms. Shannon refused to obey the illegal directive, made a written notation thereof on her logs, and refused to drive beyond legal limits ("protected activity"). CF promptly retaliated. Ms. Shannon received written notice of discharge from employment on August 31, 1994. It is a federal violation to discharge a truckdriver for making a report of a safety violation or for refusing to drive in violation of a federal regulation. 49 U.S.C. §31105.

Under the applicable collective bargaining agreement, a discharge is not final unless and until it is approved by the duly authorized labor-management grievance panel, the Ohio Joint State Committee ("OJSC").

CF's attorneys argued below that CF's decision to discharge Ms. Shannon was motivated *solely* in response to a heated argument between Ms. Shannon and another employee on July 1994. ("Dowler incident").

The CF manager who initiated the discharge proceedings, however, testified that while his "decision to discharge Ms. Shannon took place on July 21," the events in late August (i.e. her protected activity) also were "part of her discharge". (Appendix, p. 13a).

All asserted grounds for Ms. Shannon's discharge, including the Dowler incident and Ms. Shannon's protected activity, were reviewed by the OJSC on October 12, 1994.

Because CF had failed or refused to provide the Union with any proof concerning the alleged Dowler incident, the OJSC refused to hear any testimony or take any further evidence concerning that matter. The Chairman said, "Move it along I ain't going to hear it", and "Now you only get one bite. You present your facts at this time or the next time it's just a rebuttal against what the Union says". CF presented no more facts about the Dowler incident thereafter at the OJSC Hearing.

The Dowler incident was thus never proven and was, in fact, specifically excluded as grounds for discharge by the OJSC.

In sum, Ms. Shannon's discharge was approved by the OJSC on grounds which specifically *did not* include the Dowler incident but which *did* include her federally protected activity.

It is therefore respectfully submitted that the Court of Appeals erred by finding substantial evidence that Ms. Shannon's discharge was lawfully carried out in its final execution based upon the Dowler incident.

II. The Supreme Court should clarify the legal standards applicable to "dual motive" discharges to prevent employers from violating federal safety laws with impunity.

The Court of Appeals and the ARB each ruled that CF was motivated to discharge Ms. Shannon, in part, in retaliation for her protected activity. Nevertheless, the discharge was upheld because, "the Dowler confrontation was the original and independent impetus for the plaintiff's discharge", and, "defendant did pursue the plaintiff's discharge prior to plaintiff's safety complaints". (Appendix, p. 4a).

The Court below was constrained to mechanistically apply the "dual motive analysis" discussed in *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977), *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), and *Price Waterhouse v. Hopkins*, 490 U.S. 228, 246 (1989). Under the dual motive theory, an employer effectively gains immunity from liability if it proves it had grounds for discharge prior in time to the employer intentionally forcing an employee to violate a federal safety regulation.

Under *Mt. Healthy, NLRB v. Transportation Management*, and *Price Waterhouse, Id.*, an employee loses all legal protection against coercive management practices and illegal discriminatory retaliation once an employer documents grounds for discharge. Trucking company managers now routinely "paper" drivers with warning letters threatening discharge and calling for disciplinary hearings in the future on all manners of infractions. Once the discharge warning letter is in the employee's personnel file, the employer then has maximum leverage to force the employee to violate federal

safety laws, safe in the knowledge the employee cannot prevail in an action to enforce her federally protected rights.

Given CF's admission that it is a routine industry practice to require drivers to illegally log time en route as "off duty", unscrupulous trucking companies can violate Department of Transportation regulations with impunity to increase profits at a substantial risk to the driver and the motoring public. The *Mt. Healthy, NLRB v. Transportation Management,* and *Price Waterhouse* cases have created a massive loophole which certain managers in the trucking industry are exploiting with a vengeance.

In the instant case, under the law as currently defined by the Supreme Court, the Department of Labor was put in the position of defending an employer's right to discharge an employee whose whistleblowing activity uncovered an illegal, nationwide pattern of employers forcing drivers to falsify driving logs. In this case, the regulators became defense counsel for the violator. This case illustrates how the current case law, as interpreted, frustrates rather than implements the legislative intent of the Surface Transportation Assistance Act.

Petitioner Shannon respectfully urges the Court to clarify and refine the "dual motive analysis" and thereby close the public safety loophole discussed hereinabove.

It is respectfully submitted that *Mt. Healthy, NLRB v. Transportation Management,* and *Price Waterhouse* should be explained and interpreted to permit judges to order reinstatement and other damages if the employer's violation is egregious in terms of risk to public safety, even if the employee was otherwise dischargeable. If reinstatement is not

an appropriate remedy in a particular case, the aggrieved employee should at least be entitled to recover damages and legal fees for successfully proving the employer violated federal safety laws and thereby wrongfully exposed the employee and others to injury or death.

The proposed clarification of the "dual motive analysis" set forth above, applied prospectively, would strengthen the underlying purpose of the Surface Transportation Assistance Act and would discourage employers from forcing employees to break federal safety laws.

CONCLUSION

In the instant action, it is respectfully submitted that the Sixth Circuit Court of Appeals erred by finding substantial evidence that Ms. Shannon's discharge was ultimately carried out on the basis of the Dowler incident. As such, it is submitted that the uncontroverted existence of CF's retaliation against Ms. Shannon for her protected activity was unlawful and in need of remedy by the Supreme Court.

In addition, and of great national importance in the field of employment law, it is submitted that the "dual motive analysis" as currently applied by the Sixth Circuit and other federal courts, grants *carte blanche* immunity to an employer who is, by definition, a violator of one or more federal safety laws and who has, by definition, actively retaliated against an employee for exposing those violations. The void in the current law in such a circumstance is manifestly unjust and exposes the public to unnecessary risk of injury or death.

The Supreme Court is respectfully urged to grant certiorari to examine this anomaly in employment law, to clarify the law as it is currently interpreted by the federal circuit courts, and to reverse and remand the instant action consistent with such clarification.

Respectfully submitted.

Phillip L. Harmon, Esq.
Suite 105, 6649 N. High Street
Worthington, Ohio 43085
(614) 433-9502
Attorney for Petitioner
Shannon

(Any footnotes trail end of each document)

No. 98-3684

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CYNTHIA SHANNON,
Petitioner

v.

CONSOLIDATED FREIGHTWAYS CORPORATION; UNITED STATES DEPARTMENT OF LABOR, Administrative Review Board,
Respondents

May 14, 1999, Filed

NOTICE: NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 206 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 206 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

COUNSEL: For CYNTHIA SHANNON, Petitioner: Phillip L. Harmon, Worthington, OH.

For CONSOLIDATED FREIGHTWAYS CORPORATION, Respondent: Manuel Jose Asensio, III, Joseph C. Devine, Baker & Hostetler, Columbus, OH.

For UNITED STATES DEPARTMENT OF LABOR, Respondent: John Shortall, Bruce Justh, U.S. Department of Labor, Office of the Solicitor, Washington, DC.

JUDGES: BEFORE: KEITH, MERRITT and DAUGHTREY, Circuit Judges.

OPINIONBY: MERRITT

OPINION: MERRITT, Circuit Judge. The plaintiff, Cynthia Shannon, appeals a decision by the United States Department of Labor Administrative Review Board holding that the defendant did not violate federal law by dismissing her from a truck-driving job because it had a legitimate, Nondiscriminatory reason. The plaintiff alleges that the defendant, Consolidated Freightways Corporation, violated the Surface Transportation Assistance Act, 49 U.S.C. § 31105, by dismissing her after she refused work in violation of the Act and later made a safety complaint. The Board ruled that the plaintiff did participate in protected activity under the Act and that the defendant discharged her on the basis of her "overall work record," which included both protected and unprotected activity. The Board also ruled, however, that the defendant would have dismissed the plaintiff regardless of her protected activity. The question on appeal is whether substantial evidence supports the Board's ruling.

There is substantial evidence in the record in support of the Administrative Review Board's ruling for the defendant. Since the parties do not challenge the Board's remarks that the plaintiff's discharge may have been partially motivated by her protected activity, the only issue is whether the defendant has proved that it would have dismissed the plaintiff in any event for a non-discriminatory reason.

The record clearly supports the Board's finding that the defendant intended to discharge the plaintiff for the Dowler confrontation well before her protected activity in late August 1994. The Board pointed to Koble's testimony before the Administrative Law Judge in which he stated that he first decided to discharge the plaintiff on July 21st, the day after the Dowler confrontation. (J.A. at 621.) Koble also met with the plaintiff and her union representative on July 21st and informed them that he intended to initiate discharge proceedings. (J.A. at 624.) The plaintiff herself testified that Koble had notified her on July 21st that she would be discharged.

> Question: Okay. So in fact, just as [Koble] had told you back on July 21, he had followed through and made good on the fact that he was going to fire you, didn't he?
>
> Plaintiff: Well, he said he was going to.
>
> Question: And then he did. Right?
>
> Plaintiff: Yes.

Immediately after the threatening confrontation, Koble scheduled the plaintiff's discharge hearing for August 2nd, prior to the plaintiff's protected activity later that month. (J.A. 123.) Because the plaintiff was allegedly ill on August 2nd, Koble rescheduled the discharge hearing for August 23rd, though this meeting was later postponed because of a scheduled conflict. The plaintiff's hearing finally occurred on August 30th, and she was then formally discharged based on her "overall work record," which by this time included both the Dowler confrontation and the incidents from the

plaintiff's August 24-26th job. Nevertheless, the record convincingly suggests that the Dowler confrontation was the original and independent impetus for the plaintiff's discharge. Furthermore, there is record evidence that other employees who confronted coworkers were similarly subject to discharge.

The plaintiff argues unpersuasively that "controlling case law" demands a judgment in her favor. In the cases cited by the plaintiff, the defendants did not have legitimate grounds for dismissal or did not pursue those grounds until after the plaintiff's protected activity. Here the Dowler confrontation was a legitimate basis for discharge, and the defendant did pursue the plaintiff's discharge prior to the plaintiff's safety complaints.

Accordingly, the Court declines to set aside the decision of the Administrative Review Board.

Administrative Review Board
United States Department of Labor

IN THE MATTER OF CYNTHIA SHANNON,
COMPLAINANT, v. CONSOLIDATED
FREIGHTWAYS, RESPONDENT.
ARB CASE NO. 98-051
ALJ CASE NO. 96-STA-15
APRIL 15, 1998
FINAL DECISION AND ORDER

This case arises under the employee protection (whistleblower) provision of the Surface Transportation Assistance Act (STAA), (1994), and implementing regulations. 29 C.F.R. Part 1978 (1997). The complaint alleges that Respondent discharged Complainant in violation of STAA section 31105(a)(1)(A) (protected safety complaint) and section 31105(a)(1)(B) (protected work refusal). The safety standard underlying Complainant's charge is a Department of Transportation (DOT) regulation that limits a driver's "maximum driving time" in order to avoid driver fatigue: "No motor carrier shall permit or require a driver of a commercial motor vehicle to drive, nor shall any driver drive ... for any period after [h]aving been on- duty 70 hours in any period of 8 consecutive days .... " 49 C.F.R. § 395.3(b)(2) (1996).

In defending, Respondent advances a legitimate nondiscriminatory reason for the decision to discharge Complainant, i.e., that she threatened a co-worker with physical harm. This threat caused Respondent to institute discharge proceedings as provided under the applicable collective bargaining agreement (National Master Freight Agreement (NMFA)).[1] Respondent also argues that it

discharged Complainant based on her "overall work record" which included several warning letters which she received for alleged infractions of work rules immediately preceding the initial (local) NMFA discharge hearing.

In a Recommended Decision and Order (R.D.) issued on December 16, 1997, the Administrative Law Judge (AU) recommended dismissal of the complaint, finding that the discharge was motivated solely by the co-worker confrontation. R.D. at 10-11. On a preliminary issue, the AU declined to defer to the outcome of the related grievance proceeding as provided under 29 C.F.R. §1978.112(c). Id. at 7. We agree, for the reasons cited by the AU, that deferral is not appropriate in this case, and we adopt this finding without extended discussion.[2] We accept the AU's merits recommendation, as explained below.

BACKGROUND

A. Facts

From 1990 until her discharge in 1994, Complainant Cynthia Shannon was employed as an over-the-road truck driver or "transport operator" by Respondent Consolidated Freightways Corporation (CF), a commercial motor carrier.[3] She was employed initially by CF on the extra" board. In early 1994, Shannon successfully bid on the Columbus, Ohio -- Chicago/Peru, Illinois, freight run. Hearing Transcript (T.) 377. The bid also could include intermediate stops (or "VIA's") at Cincinnati and Sidney, Ohio. Shannon was dispatched out of the CF Columbus, Ohio, regional terminal where Stuart Koble was employed as assistant terminal manager for linehaul operations.

1. The Dowler incident

On July 20, 1994, Shannon confronted Debby Dowler, linehaul secretary, between two vending machines in a corner of the drivers' breakroom at the Columbus terminal. Evidence of the confrontation consists of Shannon's testimony, T. 281-287, 391-402, a notarized statement by Shannon (Respondent's Exhibit (RX) N) and an undated, unnotarized typed statement signed by Dowler (RX AAA). Dowler did not testify at the STAA hearing, nor did she participate at any level of the NMFA proceeding arising Out of the discharge. T. 473. While Shannon's and Dowler's accounts of the confrontation differ markedly, they agree at minimum (1) that Shannon charged Dowler with interfering in, and admonished Dowler to stay out of, her (Shannon's) "personal life" or "personal business" and (2) that Shannon threatened Dowler with harm upon leaving the workplace.

On July 21, Koble met with Shannon and a Teamsters local union representative to discuss the incident involving Dowler. Koble announced that he intended to initiate discharge proceedings against Shannon because of the confrontation. T. 403-405. A hearing regarding the incident, scheduled initially for August 2, eventually was convened on August 30 following several postponements. By letter of August 31, CF advised Shannon that "[b]ased on [her] overall work record and the facts presented [at the hearing], the Company has no alternative but to take the position of discharge." RX Z. Shannon was allowed to remain on the job until the discharge decision was sustained under the NMFA by the Ohio Joint State Grievance Commission.

2. "Overall work record" and "the Sidney incident"

Although CF's initial rationale for initiating disciplinary proceedings against Shannon was the Dowler confrontation,

the scope of the charge ultimately was expanded to include alleged dissatisfaction with her "overall work record." Shannon's overall work record included three warning letters received as the result of a run from Columbus, Ohio, to Peru, Illinois, and return to Columbus via Sidney, Ohio, immediately preceding the August 30 local discharge hearing. The warning letters cite Shannon for "late logs" (RX Q), "failure to follow instructions" (RX R) and "delay of freight" (RX U). In particular, on August 25, CF determined that it had not received Shannon's logs (record of duty status) for August 22 and 23. Under CF policy, these logs must be submitted at the "home domicile" daily or immediately upon completion of the "tour of duty." See RX A at 56.[4] On August 22, Shannon allegedly submitted an incomplete hours of service card. On August 25, Shannon allegedly "delayed freight" by failing to recontact the CF Columbus dispatch for a period of about 45 minutes following an initial contact. The delay occurred after Shannon ceased driving because she had exhausted her maximum available on-duty hours under 49 C.F.R. §395.3Co)(2), and accordingly was prohibited by regulation from operating a commercial motor vehicle. Shannon discovered the warning letters posted at the Columbus terminal upon returning from Peru via Sidney on August 26. The letters arose in the following context, denominated the "Sidney incident."

On August 24, Shannon had departed Columbus on the run to Peru, after advising CF that she had only 20.75 on-duty hours remaining for the period August 18 through August 25. Under CF work rules, Shannon was authorized to depart Columbus with a minimum 20 hours of on-duty time remaining. T. 236-237. Due to unanticipated delays, Shannon departed Peru on the return run with a mere 8.25 hours in which to reach Columbus, via a stop in Sidney. Lacking

alternative drivers, the Peru dispatcher pressured Shannon to run the Sidney VIA, even though he recognized that she would exhaust her hours before completing the return to Columbus. RX EE. Shannon was hauling 2,700 pounds of "hot" freight for delivery to Whirlpool Corporation in Sidney and other freight which, if not technically "hot," at least was "expedited."[5] Throughout the trip, Shannon apprised the various dispatchers of her dwindling on-duty hours.

While Shannon was in Sidney delivering cargo and awaiting dispatch, Columbus dispatcher Jody White instructed her to log off duty. This instruction was an attempt by White to conserve Shannon's available driving hours. T. 246. Shannon complained that the procedure was illegal under DOT regulations, but did not refuse the order to depart Sidney with the shipment. Shannon refused, however, to log the delay as off duty hours (as White had directed), and as a result exceeded the 70-hour limitation according to her log book.[6] The alleged protected "work refusal" is this refusal to log hours worked as CF directed, i.e., a refusal to operate a commercial motor vehicle having logged work hours incorrectly.

The alleged protected "complaints" focused on Shannon's expressed concerns that White's order to log off duty was illegal and that any drive time from Sidney to Columbus violated 49 C.F.R. §395.3(b)(2). Because the freight scheduled for delivery to Pocono via Columbus was expedited, Shannon waited at the Sidney terminal during the 45 minute period that White directed her to log off duty. Koble reportedly directed the Sidney dispatch "that they were to get [Shannon] out of the terminal quickly due to the fact that she was carrying a hot load that needed to get to the customer as soon as possible and that she was running short

of hours." R.D. at 4. Under DOT regulations, off duty time is time "when the driver is not on-duty, is not required to be in readiness to work, or is not under any responsibility for performing work." 49 C.F.R. § 395.8(h)(I). On-duty time is all time from the time a driver begins to work or is required to be in readiness to work until the time [s]he is relieved from work and all responsibility for performing work. The regulations enumerate nine examples of on-duty time, e.g., time at carrier property waiting to be dispatched; time spent inspecting, servicing or conditioning the vehicle; driving time; time attending a vehicle being loaded or unloaded, remaining in readiness to operate the vehicle. 49 C.F.R. §395.2 ("on-duty time" defined).

In its August 31 "position of discharge" issued as a result of the August 30 local NMFA hearing, CF listed "five major infractions" as grounds for the decision to terminate Shannon: (1) excessive absenteeism; (2) "insubordination and physically threatening the well being of [a co-worker]" (the Dowler confrontation); (3) falsifying pay sheets or time cards; (4) "[f]ailure to comply with Federal Motor Carrier Safety Regulation 395;" and (5) failure to submit monthly log recaps. RX Z. The record supports some absenteeism; the July 20 threat; an incomplete service card (Aug. 22); the Aug. 22 and 23 "late logs," a violation of CF policy but apparently not a DOT violation; the August 25 complaint about violative drive time and refusal to log off duty; the August 25 "delay of freight;" and the failure to submit monthly recaps, a violation of CF policy. The record contains no evidence of pay sheet or time card falsification.

B. The ALJ's recommended decision

The A.J found that CF's single motivation in discharging

Shannon was the unprotected co-worker confrontation and that "no evidence" demonstrated that adverse action "was in any way motivated by [Shannon's] engagement in alleged protected activity." R.D. at 11. According to the ALJ, since Shannon "failed to establish that her discharge was motivated by any protected reason, her claim must be dismissed." Id. The ALJ employed elements of a "pretext" analysis, see discussion infra, namely that CF articulated a legitimate nondiscriminatory reason for discharging Shannon -- the Dowler confrontation. The ALJ reasoned: "Therefore, [Shannon] must prove, by a preponderance of the evidence, that the legitimate reason proffered by [CF] is a pretext for discrimination." Id. at 10. In holding that Shannon failed to meet this burden, the ALJ rejected evidence of disparate treatment, i.e., similarly situated employees allegedly treated differently than Shannon, and relied heavily on the testimony of linehaul manager Koble that he intended to discharge Shannon "based on the episode of July 20, 1994." Id. The A_J also cited Koble's testimony as the basis for a finding arguably relevant to a "dual motive" analysis (discussed infra): "I further find that [Shannon] would have been discharged had this formal [August 30] hearing taken place as scheduled [on August 2], which was well prior to [Shannon's] run to Peru, Illinois" on August 24-25. Id. at 11. In other words, the AU found that Shannon would have been discharged in the absence of any protected activity.

DISCUSSION

To prevail on a whistleblower complaint, a complainant must establish that the respondent took adverse employment action because she engaged in protected activity. A complainant initially may show, for example under a "pretext" analysis,[7] that a protected activity likely motivated the adverse action.

Guttman v. Passaic Valley Sewerage Comm'rs, Case No. 85-WPC-2, Sec. Dec. Mar. 13, 1992, slip op. at 9, (3d Cir.), cert. denied, (1993). A complainant meets this burden by proving (1) that she engaged in protected activity, (2) that the respondent was aware of the activity, (3) that she suffered adverse employment action, and (4) the existence of a "causal link" or "nexus," e.g., that the adverse action followed the protected activity so closely in time as to justify an inference of retaliatory motive. (7th Cir. 1995); (11th Cir. 1995); (8th Cir. 1995); (8th Cir. 1989). A respondent may rebut this prima facie showing by producing evidence that the adverse action was motivated by a legitimate nondiscriminatory reason. The complainant then must prove that the proffered reason was not the true reason for the adverse action and that the protected activity was the reason for the action. (1993).[8]

Alternatively, under a "dual motive" analysis, a complainant may prove, by a preponderance of the evidence, that a respondent took adverse action in part because she engaged in protected activity. For example, a respondent may admit, or direct evidence may establish, that protected activity provided part of the motive for the adverse action. In this event, the burden of persuasion shifts to the respondent to demonstrate that the complainant would have been disciplined even if she had not engaged in the protected activity. (9th Cir. 1991) (dual motive test set forth in (1977), applies where it was "undisputed" that complainant engaged in protected activity and "that this was a motive for disciplinary action"); ; Mackowiak v. Univ. Nuclear Sys., Inc., 159, 1163-1164 (9th Cir. 1984). The burden of persuasion shifts under the "dual motive" model because the complainant has proved retaliation, i.e., that the respondent took adverse action "because" the complainant engaged in protected activity. (a)(1)(A) and (B). A violator then must establish a form of

affirmative defense in order to avoid liability. "The employer's burden in ... a 'dual motive' case resembles an 'affirmative defense: the plaintiff must persuade the fact finder on one point, and then the employer, if it wishes to prevail, must persuade it on another.'" Asst Sec'y on behalf of Lansdale v. Intermodal Cartage Co., Ltd., No. 94-STA- 22, 1995 WL 848152, at *3 n. 1 (DOL Off. Adm. App. Jul. 26, 1995), (1989).

The ALJ identified the protected activity in the case exclusively in terms of Shannon's allegations:

> The Complainant asserts that her protected activity consisted of her complaints to Jody White that she could not be relieved of duty at the terminal in Sidney, Ohio, as well as her notation of this safety regulation violation in her logs. Additionally, the Complainant alleges that her refusal to log her time in Sidney as off-duty constituted a refusal to operate a motor vehicle in a manner contrary to federal law pursuant to [(a)(1)(B)].

R.D. at 9. Without making associated findings, the ALJ proceeded to consider CF's proffered reason for discharge and to discuss the ultimate burden of persuasion under the pretext model. Absent from the analysis is discussion of the possible reference to protected activity (failure to comply with 49 C.F.R. §395) as one of the "five major infractions" fueling the discharge decision. RX Z (CF position of discharge). Moreover, Koble, the manager who initiated discharge proceedings, testified that while "[his] decision to discharge Ms. Shannon took place on July 21," the events in late August also "w [ere] part of her discharge." T. 116. See T.

194- 195 (Shannon discharged on basis of "overall work record"). If protected activity is shown to have entered into the adverse employment decision, then analysis under the "dual motive" (rather than "pretext") model is appropriate.

We find that Shannon at minimum engaged in protected activity under STAA section 31105(a)(1)(A) (protected safety complaint) when she disagreed with, and expressed concerns to, the CF dispatchers about logging improprieties and continuing to drive when her permissible hours were exhausted. (4th Cir. 1992) (court found it "eminently reasonable" that the STAA "was intended to protect drivers from having to begin trips when their employer has exerted pressure to violate the federal rules at some point during the trip"). Shannon annotated her logs to reflect that the Columbus dispatcher improperly had relieved her of duty at the Sidney terminal. RX S. Additionally, Shannon appealed to union representatives who interceded on her behalf in raising the concerns with CF dispatchers and management, including Koble. These communications about a regulatory safety violation strike us as sufficiently definitive, specific and sustained to satisfy the "complaint" criterion. (6th Cir. 1998); ("particular, repeated concerns about safety procedures" were "tantamount to a complaint").

We agree with Shannon that the evidence does not support a finding that completely discounts protected activity as a motivation for discharge. We adopt the ALJ's recommendation, nonetheless, because CF demonstrated that it would have discharged Shannon absent any protected activity. Substantial evidence supports this ALJ finding, rendering it conclusive. 29 C.F.R. § 1978.109(c)(3). The ALJ credited Koble's testimony that he decided to discharge Shannon upon learning about the July 20 confrontation and

immediately initiated discharge proceedings, meeting with Shannon and her representative on July 21 to notify them of his intent and scheduling a discharge hearing for August 2. Koble testified as to his understanding of the threat:

> Immediately after [the confrontation], Debbie [Dowler], my secretary, came into my office very abruptly, in tears, shaking, very upset, and explained to me what happened. [S]he was cornered when she came out of the ladies' room by Ms. Shannon between the vending machines and the door exiting the bathroom. That she physically threatened her, cussed and swore at her, and told her that sooner or later, she had to leave the terminal, and that she better watch her back side ...

T. 174. Dowler then ceased work for the day. According to Koble, Dowler "felt, obviously, very threatened by what had happened. And she also feared for the safety [of] her children. So, she went home." T. 175. Koble requested that Shannon "not talk to or communicate in any way with Debbie Dowler" as a condition of continued employment pending resolution of the discharge proceedings. RXX M, 0. See R.D. at 11 (reference to "immediate discharge as opposed to a discharge that allowed [Shannon] to continue work pending [NMFA] review"). The evidence does not dispute the ALJ's finding that Shannon would have been discharged had the hearing convened on August 2 as scheduled.

Koble's actions were consistent with treatment of two other CF employees who confronted co-workers. T. 137, 180-182; Complainant's Exhibit (CX) 42, RXX WW, CCC. On one occasion, Koble prohibited the offending employee from

entering the CF terminal or premises pending discharge. That employee, J.H. Comstock, telephoned the linehaul department threatening to come to the terminal with an AK-47 and "spray" everyone, including Koble. Comstock then telephoned Koble's residence threatening Koble's life and the lives of family members. RX WW. While perhaps not as egregious as this initial example, Shannon's circumstances certainly are comparable to those involving the second employee where the time frame involving warning letter, hearing and termination notice approached that at issue here. Upon being questioned about an incorrect pay sheet submitted following a November 7, 1994, work call, the employee, Robert Ruff, "became insubordinate, cussing and swearing to the supervisors on duty." CX 42. On November 10, CF issued Ruff a warning letter for failure to follow instructions, insubordination, delay of freight and dishonesty. A hearing was scheduled for November 18. Ruff was discharged. The last day worked is listed on the termination notice as November 28. RX CCC. Both of these examples show that Koble, who had assumed the linehaul manager position shortly before Shannon's confrontation with Dowler, instituted and implemented procedures for addressing disruptive behavior in the workplace. The AU addressed this evidence, albeit under the "pretext" model:

> Two employees, who did threaten and/or have a confrontation with a co- worker, were terminated by [CF]. As [CF] has asserted that [Shannon] was discharged because of her confrontation with Mrs. Dowler, the only similarly- situated employees of [CF] were those that were involved in such a confrontation. As both such employees were also terminated, I find that [CF] has dealt

> consistently with the discipline of its employees, specifically with [Shannon]. Although not conclusive in and of itself, I note that [CF] followed the proper procedural steps in disciplining this employee. There are no irregularities in this regard which would indicate that [CF] was utilizing the confrontation with Mrs. Dowler as pretext for an unlawful motive.

R.D. at 10 (citations omitted). Finally, this analysis comports with case precedent. (even if employee had engaged in protected activity, employer discharged him because of "interpersonal problems," including "rude and abrasive" behavior); (employee's abusive and inappropriate behavior toward co-workers, rather than whistleblowing activity, was the legitimate nondiscriminatory reason for discharge); (9th Cir. 1989) (employee disobedience motivated discharge); (5th Cir. 1986) (employee's legitimate discharge occasioned by cavalier attitude, abusive language and defiant conduct).

CONCLUSION

The Complainant engaged in protected activity when she complained about a violation of Department of Transportation safety regulations as an aspect of the "Sidney incident." Respondent discharged Complainant on the basis of her "overall work record," which included both this protected activity and unprotected activity. Respondent would have discharged Complainant regardless of the protected activity, however, based solely on a legitimate nondiscriminatory reason -- a confrontation with a co-worker. Accordingly, Respondent is not liable for violation of STAA section 31105. The complaint hereby IS DISMISSED.

SO ORDERED.
KARL J. SANDSTROM
Member

PAUL GREENBERG
Member

Footnotes

[1]. Complainant was represented by Teamsters Local 413 under the National collective bargaining agreement, which was supplemented by regional and State riders.

[2]. The Ohio Joint State Grievance Commission ultimately determined that Respondent's discharge decision, reached after the local hearing, was proper. The ALJ found that deferral was not appropriate because the commission hearing did not deal adequately with the Complainant's alleged protected activity, the hearing dealt almost exclusively with issues and evidence not addressed at the local hearing, and the decision consisted of a single sentence upholding the discharge. The ALJ found it "unclear, from this brief statement, what factors the committee actually considered and decided." R.D. at 7. Deferral is appropriate only if "it [is] clear that [the] proceedings dealt adequately with all the factual issues, that the proceedings were fair, regular and free from procedural infirmities, and that the outcome of the proceedings was not repugnant to the purpose and policy of the [STAA]." 29 C.F.R. §1978.112(c).

[3]. Shannon was an experienced driver. She had been employed as a driver by Roadway Express. Incorporated, between 1979 and 1990. Hearing Transcript (T.) 376.

[4]. This expeditious filing of the logs is an internal CF policy. The DOT regulations require that "[t]he driver shall submit or forward by mail the original driver's record of duty status to the regular employing motor carrier within 13 days of the completion of the form." 49 C.F.R. §395.8(i).

[5]. CF dispatched Shannon from Peru with a set of trailers. One of the trailers contained the hot shipment bound for Sidney. The second trailer contained a "prime time" shipment with an expedited delivery date bound for Pocono, Pennsylvania, via Sidney and Columbus. A hot load is "an expedited shipment requiring expedited service." T. 109 (Koble). "Prime time is a service that [CF] offers to be competitive with air freight companies. [CF] charges a premium rate to perform an expedited service." In either circumstance, "time is of the essence." T. 331-332 (Koble).

[6]. Shannon was "out of hours," under her construction, when she departed Sidney. She ceased driving, however, near Troy, Ohio, when her hours were exhausted under White's direction to log the wait time in Sidney as off duty. T. 477- 480, 487-488. The record evinces confusion as to whether Shannon was directed to "go to bed," i.e., rest at a motel for a required eight hours, when her 70 on-duty hours expired, or whether CF communicated an intent to "cushion her in, i.e., send another driver to complete the trip to Columbus with Shannon as a passenger in the "buddy seat."

[7]. McDonnell Douglas Corp. v. Green, (1973); Kahn v. United States Sec'y of Labor, (7th Cir. 1995) (court saw "no reason" not to extend McDonnell Douglas inferential method of proving discrimination employed in civil rights area to other discrimination cases arising under other congressional statutes, including Federal whistleblower statutes). See

Roadway Express, Inc. v. Brock, (I 1th Cir. 1987) (endorsing Secretary's allocation of proof in whistleblower cases).

[8]. Although the "pretext" analysis permits a shifting of the burden of production, the ultimate burden of persuasion remains with the complainant throughout the proceeding. Once a respondent produces evidence sufficient to rebut the "presumed" retaliation raised by a prima facie case, the inference "simply drops out of the picture." and "the trier of fact proceeds to decide the ultimate question." St. Mary's Honor Center v. Hi l'. . See Carroll v. United States Dep't of Labor, (8th Cir. 1996) (whether the complainant previously established a prima facie case becomes irrelevant once the respondent has produced evidence of a legitimate nondiscriminatory reason for the adverse action); Roadway Express, Inc. v. Dole, (5th Cir. 1991) (court declined to revisit sufficiency of primafacie case; "[b]ecause the case has been fully tried and we thus have a fully developed record before us, the focus of our inquiry is on the ultimate question of discrimination").

(Any footnotes trail end of each document)

No. 98-3684

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CYNTHIA SHANNON,
Petitioner

v.

CONSOLIDATED FREIGHTWAYS CORPORATION; UNITED STATES DEPARTMENT OF LABOR,
Administrative Review Board,
Respondents

June 2, 1999, Filed

ORDER DENYING PETITION TO REHEAR

BEFORE: KEITH, MERRITT, and DAUGHTREY, Circuit Judges

Counsel for the petitioner - signed "Phillip L. Harmon, Esq. (O.S.C.R. No. 0033371)" - has filed a disrespectful petition to rehear accusing the Court of undermining "an independent judiciary" by refusing to consider the arguments of counsel. The Court has considered all of the arguments of counsel, including the so-called "Dowler" incident, and has given its reasons for declining to disturb the decision of the Administrative Review Board of the United States Department of Labor. It is the Court's legal duty, by statute, to uphold the decision of the Administrative

agency if supported by substantial evidence. The decision of the administrative agency is clearly supported by substantial evidence even though it may not be to the liking of counsel for the petitioner.

Counsel for petitioner should desist from filing accusatory petitions for rehearing asserting that the Court is undermining an independent judiciary and making similar disrepectful remarks.

The panel has reviewed the petition for rehearing and concludes that the issues raised in the petition and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

Counsel for petitioner is hereby required pursuant to Rule 38 of the Federal Rules of Appellate Procedure to show cause why the Court should not award double costs against petitioner and in favor of respondent. The petitioner shall have ten (10) days in which to reply to this order to show cause.

Accordingly, it is so ORDERED

ENTERED BY THE COURT

Leonard Green, Clerk